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No. 01-917

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROGER W. BROWN, Ph.D.,

Petitioner,

v.

3M and AIR PRODUCTS AND CHEMICALS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether two formulations of the test for determining whether a patent is anticipated can be found to conflict when application of either formulation leads to the same result.

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PRELIMINARY STATEMENT

This case is an ordinary example of claim interpretation under settled principles of patent law. It raises no issue that would call for the exercise of the supervisory power of the Court. Briefly stated, petitioner Roger W. Brown sued respondents 3M, Air Products and others for infringement of a single claim of his patent. In the district court, 3M moved for summary judgment of invalidity on the ground that a particular prior art reference contained every element of the asserted claim. In large measure, the parties did not dispute what was disclosed by the prior art reference, and the question of anticipation therefore turned on how the asserted claim was interpreted. The district court agreed with the interpretation of 3M and granted summary judgment of invalidity. The Court of Appeals for the Federal Circuit agreed with the interpretation of the district court and affirmed. One judge on the Federal Circuit panel disagreed with the claim interpretation of the majority and dissented.

This case does not involve a conflict between circuit courts or a conflict between state and federal courts. Contrary to the assertions in the Petition, it does not raise any important or unsettled question of patent law. It involves only a particular claim interpretation of the district court and the Federal Circuit, which was correctly decided by both courts.

The Court should not take this case for the following reasons:

First, Dr. Brown did not ask the Federal Circuit to decide the question presented here – a purported conflict between two "rules" of anticipation. This Court generally

does not consider questions not raised below, and the Petition gives no reason to depart from that practice here. Any purported conflict in the law of anticipation should first be reviewed by the Federal Circuit, which handles all appeals of patent cases. Dr. Brown failed to avail himself of the standard mechanisms of resolving an alleged internal conflict within a circuit – a request for reconsideration or for an *en banc* hearing before the full Federal Circuit – before filing this Petition, which would have been the more appropriate means for addressing his current concern.

Second, this Petition does not present an occasion to resolve any purported conflict in the law of anticipation because no such conflict exists here. Dr. Brown's contention that the majority and the dissent in the Federal Circuit panel that decided this case relied on different and conflicting rules of anticipation is incorrect. Both the majority and the dissent used the same legal standard to determine anticipation. The different conclusions arose because the majority and the dissent adopted different claim interpretations, not because they used different legal standards for determining anticipation.

Third, and more fundamentally, the Petition does not identify any conflict in the law of anticipation for this Court to resolve. There is a single test for anticipation, and both the majority and the dissent properly used this test. The two "rules" cited by Dr. Brown are merely two different formulations of the same time-honored test, and there is no conflict between those two formulations because they embody the same rule. Both of the formulations identified by Dr. Brown have been used by the courts for decades to assist in the anticipation analysis.

Dr. Brown has not identified a single decision of any court that suggests that the two formulations might lead to different results.

Fourth, the Federal Circuit correctly decided the case. It properly interpreted the asserted claim and applied the proper test of anticipation. There is thus no need for this Court to review the decision of the Federal Circuit.

STATEMENT OF THE CASE

A. Dr. Brown Filed Suit For Infringement Of His Patent.

On September 1, 1999, Roger W. Brown ("Dr. Brown") filed suit against Minnesota Mining & Manufacturing Company ("3M"), Air Products and Chemicals, Inc. ("Air Products") and others for alleged infringement of U.S. Patent No. 5,852,824 (the "Brown patent"). The Brown patent dealt with a system that purportedly could be used to avoid the Y2K problem. The Brown patent disclosed a way of fooling the computer into believing that the year 2000 had not occurred by subtracting a fixed number of years from every date in the database and then setting the computer clock back by the same number of years. The sole asserted claim was claim 16, which has seven elements and reads as follows:

> An apparatus for processing year-date data in a computer system, the apparatus comprising:
>
> [1] a CPU;
>
> [2] a bus coupled to the CPU;
>
> [3] a memory coupled to the bus;

[4] a system clock coupled to the bus, wherein the system clock is set to an offset time wherein the offset time is a time other than the actual time;

[5] at least one application program stored in the memory and being executed by the CPU;

[6] a[t] least one database file stored in the memory containing records with year-date data with years being represented by at least one of two-digit, three-digit, or four-digit year-date representations; and

[7] a mechanism for converting the year-date data representations in the database file to a two-digit year-date data representation.

The prior art patent U.S. Patent No. 5,600,863, assigned to Turn of the Century Solutions, or TOCS ("TOCS patent"), disclosed the same technique of solving the Y2K problem. Just as in the Brown patent, the TOCS patent disclosed a way of fooling the computer into believing that the year 2000 had not occurred by subtracting a fixed number of years from the dates in the database.

B. 3M Moved For Summary Judgment Of Invalidity.

Dr. Brown admitted in a letter to the defendants and in court filings that the TOCS patent disclosed elements 1, 2, 3, 4, 5, and 6 (i.e., every element except element 7). Moreover, Dr. Brown did not dispute that the TOCS patent disclosed a mechanism of converting two-digit date

representations to alternate two-digit year-date data representations to avoid the Y2K problem by subtracting a fixed number of years from year-date data.[1]

On the basis of Dr. Brown's statements, the undisputed teachings of the TOCS patent, and the plain meaning of claim 16, 3M moved for summary judgment of invalidity under 35 U.S.C. § 102(e). Certain other defendants, including Air Products, joined 3M's motion. 3M argued that the plain meaning of the word "or" in claim 16 meant that the claim language was drafted in the alternative. Therefore, a prior art reference that disclosed converting any one of two-digit, three-digit, *or* four-digit date representations (or any combination of two-, three-, and four-digit date representations) invalidated the claim. Because it was undisputed that the TOCS patent disclosed, at a minimum, conversions of two-digit date representations to alternate two-digit date representations by subtracting a fixed number, 3M argued that the claim was invalid.

In his oppositions to these motions and his cross-motion for summary judgment of claim construction, Dr. Brown argued that element six was not drafted in the alternative and that as a result the mechanism claimed in element seven must necessarily be capable of converting

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[1] The parties disputed whether the TOCS patent disclosed converting year data represented in three- or four-digit formats. Because the Federal Circuit decision did not rely on whether the TOCS patent disclosed three- or four-digit date representations, that dispute is not relevant to this Petition.

all of the types of year-date data representations identified in element six: two-, three-, *and* four-digit representations. This position was contrary to the plain meaning of the word "or" and was also inconsistent with previous statements made by Dr. Brown, in which he stated that the teachings in the TOCS patent infringed his patent and, in fact, sued TOCS for patent infringement for using the system disclosed in the TOCS patent.

C. The District Court Granted Summary Judgment Of Invalidity.

On August 10, 2000, after extensive briefing and oral argument, the district court interpreted claim 16 of the Brown patent according to its plain meaning and held that the claim was anticipated under 35 U.S.C. § 102(e) by the TOCS patent. The district court used the formulation of the anticipation test, "To anticipate a claim, a prior art reference must disclose every limitation of the claimed invention, either explicitly or inherently." *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997). (App. 18.) The district court also referenced an alternate formulation of the anticipation test, "In other words, if granting patent protection on the disputed claim would allow the patentee to exclude the public from practicing the prior art, then that claim is anticipated, regardless of whether or not it also covers subject matter not in the prior art." (App. 23.) The district court denied Dr. Brown's partial summary judgment motion that his claim interpretation was correct and granted 3M's, Air Products' and the other defendants' motions for summary judgment to the extent they were

based on anticipation. The district court denied all other pending motions as moot and dismissed the complaint.

D. The Federal Circuit Affirmed The District Court's Judgment.

Dr. Brown did not move for reconsideration at the district court level but instead filed a notice of appeal to the Court of Appeals for the Federal Circuit on August 29, 2000. The Federal Circuit determined that Dr. Brown's patent was anticipated by the teachings of the TOCS patent and affirmed the judgment of the district court. The Federal Circuit decision agreed with the district court's construction of the word "or" in claim 16, holding that it meant that the claimed apparatus was capable of converting "only two-digit, only three-digit, only four-digit, or any combination of two-, three-, and four-digit date-data." (App. 5.) Since neither party disputed that the prior art TOCS patent taught the conversion of year dates in the two-digit format to alternate two-digit dates, the Federal Circuit held that this was sufficient to invalidate claim 16 because it was written in the alternative. (App. 6.) It rejected Dr. Brown's argument that claim 16 required the apparatus to have the capability to convert all three date formats (two-, three-, *and* four-digit formats) when such data are not present as contrary to the plain meaning of the claim and the word "or." (*Id.*)

In its opinion, the majority referenced the test of anticipation "To anticipate, every element and limitation of the claimed invention must be found in a single prior art reference, arranged as in the claim," citing *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1383 (Fed.

Cir. 2001). (App. 3.) The majority also cited an alternate formulation of the anticipation test, which it called a "truism," as follows: "[t]hat which infringes if later anticipates if earlier," citing *Polaroid Corp. v. Eastman Kodak Co.*, 789 F.2d 1556, 1573 (Fed. Cir. 1986) (internal citations omitted). (App. 6.) Both of these articulations of the test for anticipation led to the same result: the invalidation of Dr. Brown's patent. (*Id.*)

A dissent was filed based on one judge's belief that the disputed claim should be interpreted as requiring "the capacity to process two-, three-, *and* four-digit dates" (App. 8), although this contradicted the plain meaning of the claim. The dissent also referenced two formulations of the test for anticipation, both of which led to the same conclusion based on its incorrect claim construction. The first formulation referenced in the dissent stated, "[t]o invalidate a patent by anticipation, a prior art reference needs to disclose each and every limitation of the claim," citing *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 953 F.2d 1360, 1369 (Fed. Cir. 1991). (App. 8.) The second formulation noted, "[t]herefore, because [the TOCS patent] would not infringe if later, it cannot anticipate though earlier." (App. 9.) These were essentially the same articulations of the test for anticipation used by the majority.

Dr. Brown filed this Petition on December 17, 2001. Dr. Brown did not move for reconsideration before the Federal Circuit, nor did he request an *en banc* hearing, before filing this Petition.

REASONS TO DENY THE PETITION

I. DR. BROWN DID NOT RAISE BELOW THE QUESTION HE SEEKS TO PRESENT HERE.

Dr. Brown does not identify in this Petition where in the record he raised the question he asks this Court to decide. He did not identify where he described the question before the district court or the Federal Circuit, and he did not request reconsideration or rehearing *en banc* at either the district or circuit level. Nothing in either the district court's or the Federal Circuit's opinions suggests that Dr. Brown alerted the courts to the existence of the question offered at this time. As such, it cannot be said that either lower court decided "an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). This Court does not consider on certiorari questions not presented to the lower federal courts except in exceptional cases. *See, e.g., Sisson v. Ruby*, 497 U.S. 358, 359 n. 1 (1990); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225 (1927) ("This court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (same). Dr. Brown has not argued that this case is of such exceptional nature as to warrant overlooking his failure to raise the question below.

Moreover, because Dr. Brown identified a purported *intracircuit*, not an *intercircuit*, conflict and did not provide the Federal Circuit with the opportunity to resolve

the purported conflict, it would be premature for this Court to take this case. Since 1983, the Federal Circuit has had exclusive jurisdiction over all patent appeals and is the appellate court that interprets the law of anticipation. Intracircuit conflicts of this type are not ordinarily a sufficient basis on which to grant certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974). This Court practices restraint in resolving internal circuit conflicts. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("[I]t is primarily the task of a Court of Appeals to reconcile its internal difficulties."). *See also Moore's Federal Practice*, 3d Ed. 1998, § 510.21[2] at 510-15 ("Supreme Court Rule 10(a) contemplates a conflict between decisions of two or more court of appeals, **and not conflicting decisions of panels within a circuit. These conflicts are better resolved by the court of appeals itself, sitting en banc.**") (emphasis added). Indeed, the issue as framed by Dr. Brown is not even conflicting decisions of panels within a circuit, but a conflict between the majority ruling and the dissent of a single panel over the proper interpretation of a claim.

The reasons for this Court to avoid intervening with respect to internal conflicts of a Circuit Court of Appeals apply with particular force to the Federal Circuit in "this area of its special expertise." *Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 40 (1997). This Court need not and should not undertake to resolve in the first instance a purported conflict within one Court of Appeals, which possesses specialized knowledge and can bring it to bear *en banc* on the issue, particularly where Dr. Brown never identified the conflict to that court nor sought resolution there.

II. THIS PETITION DOES NOT IDENTIFY A CONFLICT TO BE RESOLVED IN THE LAW OF ANTICIPATION BECAUSE THE MAJORITY RULING AND THE DISSENT USED THE SAME STANDARD FOR DETERMINING ANTICIPATION.

Dr. Brown's analysis of what occurred in the Federal Circuit is inaccurate. The difference between the majority ruling and the dissenting opinion lay in the area of claim interpretation, not in the use of differing tests for determining anticipation. In fact, both the majority and the dissent articulated both "tests," or alternate formulations, of the law of anticipation. This Court recently held that claim interpretation is to be determined exclusively by the court, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), and Dr. Brown has presented nothing to suggest that this ruling should be revisited here.

A. The Majority And The Dissent Differed On Claim Construction, Not On The Test For Anticipation.

Because of numerous admissions and positions taken by Dr. Brown before the district court, the only disagreement between the parties before the Federal Circuit was on the interpretation of one claim element: element seven of claim 16. The disputed element is "a mechanism for converting the year-date data representations in the database file to a two-digit year-date data representation," and the dispute lay in the interpretation of the phrase "the year-date data representations." (App. 5.) 3M argued, and the district court and the Federal Circuit agreed, that the "the" in the phrase "the year-date data

representations" referred to the year-date data representations described in element six, the relevant part of which refers to "year-date data with years being represented by at least one of two-digit, three-digit, or four-digit year-date representations." (*Id.* at App. 5.) Because this portion of element six was written in the alternative, the plain meaning of the claim language shows that infringement of the patent would occur if the accused device converted year-date data represented by two-digit year date representations, as argued by 3M and Air Products in both the district court and the Federal Circuit.[2]

The majority agreed that Dr. Brown had formulated his claim in the alternative, stating, "By claiming his invention in the alternative, Dr. Brown has presented a claim for which infringement would lie whether or not there were also offset of three-digit and four-digit year dates." (App. 6.) As a result, the disclosure of any one of the alternatives in the prior art would be sufficient to anticipate. *See Titanium Metals Corp. of America v. Banner*, 778 F.2d 775, 782 (Fed. Cir. 1985) ("[i]t is . . . an elementary principle of patent law that when . . . a claim covers several compositions, the claim is 'anticipated' if one of them is in the prior art"). The majority interpreted the claim in this manner and determined that this claim element could be found in the TOCS patent. (*See id.*) As Dr. Brown had already acknowledged that every other claim element was found in the TOCS patent, the majority did not need to interpret the other claim elements and it

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[2] It is undisputed that the TOCS patent discloses converting a two-digit date to an alternate two-digit date by subtracting a fixed number of years.

found that the patent was invalid as anticipated. (*See id.* at 6.)

The dissenting judge arrived at a different interpretation of the sole disputed claim term described above. Though the plain meaning of the claim reads in the alternative, the dissenting judge would have found the contrary, stating his belief that "This is not a case of a species anticipating a genus, or of a combination claimed in the alternative." (App. 7.) Consequently, the dissenting judge incorrectly interpreted the claim to require the invention to contain the "capacity" to process two-, three-, *and* four-digit dates, even if those formats were not necessarily used in all conversions. (*See id.* at 7-8.) Based on this incorrect claim interpretation, the dissenting judge would have ruled in favor of Dr. Brown on the issue of anticipation and would have remanded the case to the district court for further proceedings. (*See id.* at 7.)

B. The Majority And The Dissent Used The Same Standard For Determining Anticipation.

The majority and the dissent did not use different tests for anticipation. Both sides cited the proper test for anticipation. Both also referenced a common reformulation of that test for purposes of clarity.

1. The majority based its ruling on the test "To anticipate, every element and limitation of the claimed invention must be found in a single prior art reference."

The majority identified a current correct statement of anticipation law: "To anticipate, every element and limitation of the claimed invention must be found in a single prior art reference, arranged as in the claim." *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1383 (Fed. Cir. 2001). (App. 3.) The majority then looked at the claims and interpreted the sole disputed claim term as described above.

To clarify the point, the majority identified an alternate formulation for the test of anticipation, or what it called a "truism," which states, "[T]hat which infringes if later anticipates if earlier." *Polaroid Corp. v. Eastman Kodak Co.*, 789 F.2d 1556, 1573 (Fed. Cir. 1986) (internal citations omitted). (App. 6.) The majority also referenced *Lewmar Marine, Inc. v. Barient, Inc.* for a general discussion of this formulation of the anticipation test. *See Lewmar Marine, Inc.*, 827 F.2d 744, 747 (Fed. Cir. 1987). This alternate formulation was used as additional support for its conclusion. (*See id.*)

2. The dissent based its opinion on the test "To invalidate a patent by anticipation, a prior art reference needs to disclose each and every limitation of the claim."

Despite Dr. Brown's representations in his Petition, the dissenting judge undertook the same analysis as the majority, first stating the test for anticipation and then

stating the alternate formulation. (*See id.* at 8.) The dissenting judge first stated the standard test for determining anticipation: "To invalidate a patent by anticipation, a prior art reference needs to disclose each and every limitation of the claim." *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 953 F.2d 1360, 1369 (Fed. Cir. 1991). (App. 8.) Because the test was applied to the incorrect claim interpretation described above, the dissenting judge would have determined that not every claim limitation was met by the TOCS prior art reference. (*See id.*) The dissent then referenced the same alternate formulation stated by the majority ("Therefore, because it would not infringe if later, it cannot anticipate though earlier") and confirmed its belief that Dr. Brown's patent was not anticipated. (*Id.* at App. 9.)

III. DR. BROWN HAS FAILED TO IDENTIFY A CONFLICT BETWEEN ALTERNATE FORMULATIONS OF THE TEST FOR ANTICIPATION.

Dr. Brown has failed to cite a single decision of any court that suggests there is a conflict between the two alternate formulations of the test for anticipation used by the Federal Circuit in this case. Dr. Brown has identified cases going back to the 1960s referring to one of the formulations (see Petition at 6-7) and has identified cases going back to the 19th century referring to the other formulation (see *id.* at 5). Over this entire period of time, he has found no case that supports his argument that using one or the other of the two formulations might somehow lead to a different result.

Dr. Brown has failed to identify a conflict between alternate formulations of the test for anticipation because the "conflicting" tests he identifies are, in fact, different formulations of the same test. The most commonly cited formulation of the test for determining whether a claim is anticipated is whether "every element and limitation of the claimed invention [is] found in a single prior art reference." *Karsten Mfg. Corp.*, 242 F.3d at 1383. The test for literal infringement is the same as this anticipation test: to determine whether a claim is infringed, the claim scope is determined and then "the properly construed claim is compared with the accused device to determine whether all of the claim limitations are present." *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001). Thus, the inquiry as to anticipation is symmetrical with the inquiry as to infringement. *See* Donald S. Chisum, *Chisum on Patents* § 3.02[1], at 3-12 (2001); *see also Amazon.com, Inc.*, 239 F.3d at 1351 ("Conceptually, the first step of an invalidity analysis based on anticipation . . . in view of prior art references is no different from that of an infringement analysis."). This leads directly to what has been called the "classic infringement test" for anticipation: "That which will infringe, if later, will anticipate, if earlier." *See Chisum on Patents*, § 3.02[1] at 3-12.

Because the so-called "classic infringement test" for anticipation is derived directly from the other anticipation formulation, there can be no conflict between the two formulations. The complementary nature of the two formulations is well understood by the Federal Circuit, which discussed the two tests at some length in *Lewmar Marine, Inc.* In *Lewmar Marine*, the Federal Circuit stated

that "[a]nticipation under 35 U.S.C. § 102 requires the presence in a single prior art disclosure of each and every element of a claimed invention." 827 F.2d at 747 (internal citations omitted). The Court also discussed the district court's use of "the classic test of anticipation," which states, "[T]hat which will infringe, if later, will anticipate, if earlier,"[3] and the relationship between the "classic" test and the contemporary test. *Id.* (internal citations omitted).

Because Dr. Brown can find no authority from the Federal Circuit, or from any other court, that supports the novel proposition that the two time-honored formulations of the anticipation test are in conflict, Dr. Brown attempts to support his misunderstanding of anticipation law with an argument based on an improperly cropped citation from a 1984 treatise, *Lipscomb's Walker on Patents*. (*See* Petition at 11.) The portion cited by Dr. Brown does not include the last line of the paragraph, which provides the necessary to context to understand the passage.[4]

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[3] The Federal Circuit noted that the "classic" test could more accurately be stated as follows: "[t]hat which would *literally* infringe if later in time anticipates if earlier than the date of invention." *Lewmar Marine*, 827 F.2d at 747. Dr. Brown does not allege that this difference in the wording of the test has any bearing on the result in this case.

[4] The full paragraph cited by Dr. Brown reads as follows, with the sentence omitted by Dr. Brown emphasized in bold:

> It is frequently said: "That which infringes, if later, would anticipate, if earlier." But that epigrammatic formula is too broad, and those who have used it must have overlooked the distinction between primary patents and secondary patents. That which would infringe a primary patent, if later, may or may not anticipate that patent, if earlier. Where an

When read in its entirety, it is clear that the passage is an irrelevant statement regarding the use of prior art to narrow the scope of a claim.

IV. THE FEDERAL CIRCUIT CORRECTLY DECIDED THE CASE USING THE PROPER TEST FOR ANTICIPATION.

Regardless of which formulation of the test for anticipation was used, Dr. Brown's patent would still be invalidated on remand because the majority's analysis of the claim construction was correct. Claim 16, construed according to its plain meaning, states that the claimed invention can convert at least one of two-digit, three-digit or four-digit year-date data representations. The majority found that this claim language disclosed alternate structures and stated that, "[w]hen a claim covers several

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> inventor believes his invention to be primary, but thinks it may possibly turn out to be secondary, he may properly make his claim in a form that can be construed to fit his invention in either event. Afterward, when he seeks to suppress a different but competing contrivance as being an infringement of his claim, when broadly construed, that contrivance may be held to infringe, if later, while not being held to anticipate, if earlier. **If the competing contrivance turns out to be earlier, it may have no effect on his patent, except to relegate it to the secondary position in the art, and thus to limit its claim so narrowly that the competing contrivance does not infringe it.**

Ernest Bainbridge Lipscomb, III, *Lipscomb's Walker on Patents*, § 4:4 (3d Ed. 1984) (emphasis added).

structures or compositions, either generically or as alternatives, the claim is deemed anticipated if any of the structures or compositions within the scope of the claim is known in the prior art." *Titanium Metals Corp. of America*, 778 F.2d at 782. (App. 3.) Because the prior art TOCS patent discloses converting two-digit year-date data representations to other two-digit representations by subtracting a fixed number of years, and because Dr. Brown does not dispute that all other claim elements can be found in the prior art, the majority found Dr. Brown's patent invalid as anticipated under either formulation of the test.

Using the majority's claim construction, under the current articulation for the test of anticipation, in which every claim element must be found in the prior art, Dr. Brown's patent is anticipated because each and every claim element is found in the TOCS patent. Because the Federal Circuit held that claim 16 was written in the alternative, disclosure of any one of the alternatives (two-digit, three-digit or four-digit representations, or any combination of them) in the prior art was enough to disclose that element fully. *See Titanium Metals Corp. of America*, 778 F.2d at 782.[5] Under the "classic" articulation, in which anticipation occurs if a prior art reference would infringe if it had come later, Dr. Brown's patent is anticipated because a device that converted only two-digit

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[5] Dr. Brown's analysis in the Petition appears to be based on a misunderstanding of patent law as set out in the *Titanium Metals* case. Dr. Brown appears to believe, mistakenly, that every one of a series of alternatives must be found in a prior art reference before that element can be considered disclosed. As discussed previously, that is not and has never been the law.

year-date data representations would infringe Dr. Brown's patent. Because it is undisputed that the TOCS patent can convert two-digit year-date data representations, claim 16 is anticipated under this test as well.

Similarly, the dissent is incorrect regardless of which formulation of the test is used because the dissenting judge would have adopted an incorrect claim construction. The dissenting judge interpreted the claim as requiring "the capacity to convert all of the possible data sets into two-digit year-date data representations." (App. 7, emphasis added). This interpretation is improper because the disputed claim term does not contain the word "capacity" and thus contradicts the plain meaning of the claim. Claims may not be construed in a manner that contradicts their plain meaning. *See Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1336 (Fed. Cir. 2001) (holding plaintiff's proposed claim construction "illogical" because it "does not accord with the plain import of the claim language").

CONCLUSION

For the foregoing reasons, Dr. Brown's petition for writ of certiorari should be denied.

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